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No. _____

IN THE

Supreme Court of the United States

MICHAEL L. MCGEE

Petitioner,

v.

BYRAN BARTOW,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEROLD S. SOLOVY
Counsel of Record
DAVID J. BRADFORD
ERIC J. SCHWAB
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
jsolovy@jenner.com

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Counsel for Petitioner

QUESTION PRESENTED

Whether Due Process permits the indefinite civil confinement of a convicted sex offender based on any purported psychiatric diagnosis that is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession."

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PETITION FOR A WRIT OF CERTIORARI

Michael L. McGee ("McGee") respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 593 F.3d 556 (7th Cir. 2010), and reprinted in the appendix to this petition ("Pet. App.") at 1a-58a. The decision and order of the district court is reported at No. 06-C-1151, 2007 WL 2442252 (E.D.Wis. Aug. 23, 2007), and is reprinted at Pet. App. 59a-65a. The district court's memorandum decision and order denying motion to dismiss is reported at No. 06-C-1151, 2007 WL 1062175 (E.D.Wis. Apr. 3, 2007), and reprinted at Pet. App. 66a-77a.

JURISDICTION

The court of appeals entered its judgment on January 27, 2010. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *. . . nor shall any state*
> *deprive any person of life,*

liberty, or property, without due process of law.

STATUTES INVOLVED

The relevant provisions of Wisconsin Statutes Chapter 980, Sexually Violent Person Commitments, is reprinted in the appendix to this petition at Pet. App. 78a.

STATEMENT OF THE CASE

A. Introduction

Due process permits the indefinite civil confinement of a convicted sex offender as a "sexually violent person" ("SVP") only where there is "proof of *serious* difficulty in controlling behavior . . . *sufficient* to distinguish the dangerous sexual offender whose *serious* mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (emphasis added).

In the eight years since *Crane*, state and federal courts have yet to determine whether, as a matter of due process of law, any minimum substantive standard governs when a psychiatric diagnosis is "sufficient" and "serious" enough to support a legal determination of "mental illness, abnormality, or disorder" for the purpose of SVP confinement. In the opinion below, the court of appeals upheld Mr. McGee's civil commitment based on less than a constitutionally *de minimis* standard for assessing the reliability of the psychiatric diagnosis relied upon to justify indefinite civil confinement. Specifically, the court of appeals held that due process allows virtually any diagnosis of a purported psychiatric "disorder" proffered by State-employed SVP examiners to serve as the requisite evidence of serious mental illness, as long as that diagnosis is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession." Pet. App. 51a, 57a.

The Seventh Circuit's ruling reflects the crying need for this Court's guidance about the level of reliability required by due process for a psychiatric diagnosis that is relied upon as the basis for indefinite civil detention. In both *Crane* and *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court established that ongoing scientific developments and professional debates about medical *terminology* should not be enough to invalidate a legal finding of "mental disorder" when that finding is based on an *otherwise valid and reliable* psychiatric diagnosis. *See Hendricks*, 521 U.S. at 358-59 ("We have traditionally left to legislators the task of defining *terms* of a medical nature that have legal significance. . . . Often, those *definitions* do not fit precisely with the *definitions* employed by the medical community.") (emphasis added); *Crane*, 534 U.S. at 415 ("Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments.").

The Court has never held, however, that due process permits reliance on a "mental disorder" that is *not* recognized as valid and reliable by the psychiatric community, as long as that diagnosis is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession." Pet. App. 51a, 57a. In *Crane*, for example, this Court characterized the civil commitment approved in *Hendricks* as predicated on "the presence of what the psychiatric profession itself classifie[d] . . . as a serious mental disorder." 534 U.S. at 412. Indeed, this Court's precedents have dealt with factual

circumstances involving psychiatric diagnoses that were recognized (or undisputed) as scientifically valid and empirically reliable evidence of psychiatric impairment. *Hendricks*, 521 U.S. at 360 (pedophilia); *Crane*, 534 U.S. at 411 (exhibitionism, antisocial personality disorder). *See also Seling v. Young*, 531 U.S. 250, 256 (2001) (respondent did not challenge "severe" diagnosis of "not otherwise specified" disorders).

Increasingly, since *Hendricks* and *Crane*, SVP commitments rely on purported "not otherwise specified" ("NOS") diagnoses, derived from catchall categories found in the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. ("DSM").[1] By definition, these "diagnoses" are not specified in the DSM as reliable indicators of a recognized psychiatric disorder.[2]

Yet there is no clear constitutional standard by which courts review the reliability of those diagnoses, which freely depart from the DSM criteria or any other established system of empirical verification. *Crane* did not address this issue, and since *Crane*, state and federal courts have failed to agree on what minimum due process standard, if any, governs the psychiatric diagnosis used to

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[1] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000).

[2] Commentators have criticized the "unbridled use of NOS categories" by forensic examiners in SVP trials. *See* Thomas K. Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. Am. Acad. Psychiatry & L. 459, 464 (2008). *Accord*, Robert A. Prentky *et al.*, *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. Am. Acad. Psychiatry & L. 455, 456 (2008).

support a legal finding of a "mental disorder" when a recognized diagnosis is not presented.[3]

The decisions of the district court and the court of appeals in this case reflect the lack of even a minimal due process standard for diagnostic reliability. *See, e.g.,* Pet. App. 47a (fact finder may rely on any diagnosis not shown to be "devoid of content"); Pet. App. 62a ("[T]here are no magic diagnoses . . . . [A]ll that is required is a mental condition predisposing the defendant to commit acts of sexual violence"). Instead, those decisions accept a diagnosis as presumptively reliable if the *accused* is unable to prove that his diagnosis has not yet been wholly (or "near-universal[ly]") *rejected* by the psychiatric profession. This is a "standard" that virtually every diagnosis will meet because – by definition – the profession has not yet subjected *ad*

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[3] *Compare Commonwealth v. Squire*, 278 Va. 746, 752, 685 S.E.2d 631, 633-34 (2009) ("[T]he mere use of the phrase mental abnormality or personality disorder does not automatically invoke a conclusion that a respondent is likely to engage in sexually violent acts.") *and United States v. Graham*, --- F. Supp.2d ---, No. 07-12065-JLT, 2010 WL 457445, at *1 (D.Mass. Feb. 8, 2010) (holding that diagnoses from government witnesses of antisocial personality disorder and paraphilia not otherwise specified (nonconsent) "failed to establish by clear and convincing evidence that Respondent suffers from a serious mental illness, abnormality, or disorder . . .") *with Orozco v. Kramer*, No. CV 08-3291 AHM (CT), 2009 WL 1033610, at *21 (C.D. Cal. Apr. 14, 2009), *citing Hubbart v. Super. Ct.*, 19 Cal.4th 1138, 1144, 81 Cal.Rptr.2d 492, 469, 969 P.2d 584, 588 (1999) (holding that under California state law "there is no limit on the mental disorders that may serve as the basis for civil commitment [as an SVP]").

hoc and non-standard diagnoses to empirical testing or peer review.[4]

Because the issue recurs frequently in state and federal courts across the country and the law remains unsettled, this Court's review is warranted.

B. Background

1. Under Chapter 980 of the Wisconsin Statutes, a person convicted of a sexually violent offense who has served his sentence may be indefinitely civilly committed by the state as a "sexually violent person" if that person is found to be "dangerous because [he] suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. Ann. § 980.01(7) (2003); Pet. App. D, 78a. The statute defines "mental disorder," in turn, as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *Id.* § 980.01(2); Pet. App. 78a. Wisconsin courts have interpreted the statutory term "mental disorder" to include antisocial personality disorder. *In re Adams*, 588 N.W.2d 336, 340 (Wis. Ct. App. 1998).

2. Mr. McGee was convicted of burglary and sexual assault in 1987 and sentenced to eight years' imprisonment and six years' probation. Pet. App. 2a. While on parole in 1992, Mr. McGee was

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[4] *See* Zander, *supra* note 1, at 465 ("NOS diagnoses are the antithesis of 'reasonable certainty,' because they are *ad hoc* applications based on the idiosyncratic opinion of an individual diagnostician, not the consensus of recognized thought that would be reflected in a specified diagnosis.").

twice accused of sexual assault; the accusations resulted in the revocation of Mr. McGee's parole but did not lead to criminal conviction. Pet. App. 2a-3a. In 1995 the State of Wisconsin committed Mr. McGee as an SVP but a state court later reversed that commitment, concluding that Mr. McGee's counsel during the commitment trial was ineffective for failing to discover evidence that undermined the credibility of Mr. McGee's accusers in the alleged 1992 assaults. Pet. App. 3a. Released from civil confinement in 1999, Mr. McGee's parole was revoked in 2000 for alleged drug use and for contact with one of Mr. McGee's 1992 accusers. Pet. App. 3a.

Prior to Mr. McGee's scheduled release from prison in 2003, the State of Wisconsin again sought to commit him as an SVP. Pet. App. 3a. During the SVP trial, the State presented two SVP examiners, psychology Ph.D.s employed by the State of Wisconsin, as expert witnesses. Pet. App. 3a-6a. Both examiners testified based solely on having reviewed Mr. McGee's record, without having interviewed or examined Mr. McGee personally. Pet. App. 4a-5a. One of those witnesses testified that the record did not support diagnosing Mr. McGee with an antisocial personality disorder or any sexual disorder, yet he nonetheless diagnosed Mr. McGee with what he termed a "personality disorder not otherwise specified with antisocial features," based on a review of Mr. McGee's prison disciplinary record. Pet. App. 4a-5a. The other examiner also found insufficient evidence to support a specific personality disorder but diagnosed Mr. McGee nonetheless with "personality disorder not otherwise specified with antisocial features." Pet. App. 5a, 50a.

The second examiner also diagnosed Mr. McGee with what she described as "paraphilia [*i.e.*, sexual disorder] not otherwise specified," citing as evidence the unproved allegations of sexual assault from 1992, despite the fact that the problematic credibility of those accusations led to the reversal of Mr. McGee's first SVP commitment. Pet. App. 5a.

Mr. McGee represented himself *pro se* in his SVP trial and refused to participate in the second day of the trial, and thus did not cross-examine the second expert witness. Pet. App. 6a. Based on the State's examiners' testimony, the trial court ruled from the bench that Mr. McGee suffered from an unspecified "mental disorder" within the meaning of the statute and ordered him committed as an SVP pursuant to Wisconsin Chapter 980. Pet. App. 6a.

3. Following his commitment, Mr. McGee filed a *pro se* motion for relief from judgment, arguing, *inter alia*, that the "not otherwise specified" diagnoses used in his case were neither valid nor sufficient to justify civil commitment as an SVP. Pet. App. 8a. The motion was denied, and Mr. McGee appealed his commitment order to the Court of Appeals of Wisconsin, which affirmed. Pet. App. 8a. Mr. McGee then filed a petition for collateral relief, arguing that his appointed appellate counsel was ineffective for failing to raise the due process issue regarding the validity and sufficiency of the diagnoses. Pet. App. 9a-10a. The state court of appeals denied that motion without specifically addressing Mr. McGee's claim that his commitment based on invalid and insufficient psychiatric diagnoses violated due process. Pet. App. 10a-11a.

The Supreme Court of Wisconsin denied review. Pet. App. 11a-12a.

4. Mr. McGee then filed a habeas petition *pro se* in the U.S. District Court for the Eastern District of Wisconsin, again arguing that his civil commitment was based on invalid diagnoses that were not accepted in the psychiatric community and thus did not meet the due process standard set forth in *Crane*. Pet. App. 12a-13a. The State of Wisconsin moved to dismiss the petition, claiming that Mr. McGee had procedurally defaulted his due process claims by failing to exhaust them in the Wisconsin courts. Pet. App. 14a. The district court denied the State's motion, ruling that Mr. McGee had presented his due process claims to the state courts but the state courts had failed to address them, therefore the district court was free to "dispose of the matter as law and justice require." Pet. App. 15a-16a; *see* Pet. App. C, 66a-77a (Memorandum Decision and Order Denying Motion to Dismiss). The district court then denied the habeas petition, holding that there are no "magic diagnoses" for due process purposes as long as Mr. McGee was properly "found to be an SVP based on testimony that he had a mental disorder that caused him to have serious difficulty controlling his behavior." Pet. App. 16a-17a; *see* Pet. App. B, 59a-65a (Decision and Order).

5. The court of appeals affirmed. Pet. App. 2a; *see* Pet. App. 1a-58a. The court acknowledged that the purported diagnosis of "personality disorder not otherwise specified with antisocial features" was at "variance" with the diagnostic criteria in the DSM for any personality disorder diagnosis, but held that

the diagnosis could serve as the basis for the legal determination that Mr. McGee was an SVP as long as it was not so "patently lacking in credibility and validity" that the trial court was precluded from considering it. Pet. App. 50a-52a. The court of appeals also acknowledged that the other diagnosis, "paraphilia not otherwise specified (nonconsent or rape)," was the subject of continued controversy concerning its lack of established validity and reliability. Pet. App. 52a-55a. But again, the court held that it was bound to accept any diagnosis that was not "so unsupported by science that it should be excluded absolutely from consideration by the trier of fact." Pet. App. 55a. While noting that the psychiatric profession's objections to the paraphilia NOS diagnosis are "not without persuasive value," the court of appeals held: "Given the present state of Supreme Court precedent, however, we cannot conclude that the diagnosis of a rape-related paraphilia is so empty of scientific pedigree or so near-universal in its rejection by the mental health profession that civil commitment cannot be upheld as constitutional when this diagnosis serves as a predicate." Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT FAILED TO IDENTIFY OR APPLY EVEN A *DE MINIMIS* DUE PROCESS STANDARD TO DETERMINE THE RELIABILITY OF THE PSYCHIATRIC DIAGNOSES UPON WHICH MR. MCGEE'S LOSS OF LIBERTY IS BASED

The court of appeals below effectively held that even psychiatric diagnoses that *lack* general acceptance as legitimate and empirically reliable diagnoses in the field of psychiatry may serve as the basis for SVP confinement, without satisfying any meaningful minimal due process standard of reliability. *See* Pet. App. 46a (fact-finder may consider even diagnoses "not accepted or . . . explicitly rejected by the DSM or other authoritative sources."). That decision reflects the need for guidance from this Court.

1. A review of this Court's prior decisions shows that they do not identify the minimal level of reliability required by due process when a diagnosis lacking general psychiatric acceptance is relied upon for indefinite SVP commitment.

In *Foucha v. Louisiana*, this Court held that substantive due process permits indefinite civil confinement only when there is clear and convincing proof that the person is both "mentally ill and dangerous." 504 U.S. 71, 80 (1992). In *Hendricks* this Court clarified the *Foucha* "mental illness" requirement, holding that for the purposes of SVP confinement, legal concepts like "mental disorder" or

"mental abnormality" do not need to mirror medical terminology as long as they "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. That holding rested on two critical facts: first, that Hendricks had been diagnosed with "a condition that the psychiatric profession itself classifies as a serious mental disorder"; and second, that Hendricks admitted that he had a "lack of volitional control" as a result of that disorder. *Id.* at 360, *citing* 1 American Psychiatric Association, *Treatments of Psychiatric Disorders* 617-633 (1989) *and* Abel & Rouleau, *Male Sex Offenders, in Handbook of Outpatient Treatment of Adults* 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990).

Finally, in *Crane*, this Court held that the finding of "volitional" impairment required by *Hendricks* need not necessarily entail a "complete lack of control." 534 U.S. at 411. Instead, due process requires "proof of serious difficulty in controlling behavior . . . [which], when viewed in light of such features of the case *as the nature of the psychiatric diagnosis*, and the *severity of the mental abnormality itself*, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 413 (emphasis added). Although *Crane* further suggested that the psychiatric diagnosis need not distinguish among "volitional, emotional, and cognitive impairments," *id.* at 415, the Court was careful to confirm that Crane's alleged disorders

involved recognized DSM diagnoses. *Id.* at 411, *citing DSM.*

Thus, the findings of mental disorder sufficient to support indefinite SVP confinement in *Hendricks* and *Crane* were predicated on psychiatric "disorders" (whether emotional or volitional, sexual or personality-related) that the medical profession recognizes as valid and empirically reliable diagnoses. To be sure, dicta in those decisions also emphasized the need for legislatures and courts to have "leeway" to develop legal standards for SVP commitment in the face of ongoing developments and debates in the psychiatric profession, and eschewed "bright line rules" in favor of a "contextual" approach. *Crane*, 534 U.S. at 413-14; *Hendricks*, 521 U.S. at 359. But under the facts of those cases, this Court had no occasion to determine the level of reliability required by due process in cases not involving a professionally recognized diagnosis.

2. In the proceedings below, Mr. McGee provided significant authority showing that his civil commitment as an SVP was founded on purported "not otherwise specified" diagnoses that the psychiatric profession has never recognized as valid, empirically reliable evidence of serious mental impairment, and, to the contrary, has repeatedly called into doubt. *See* Pet. App. 54a, n.14. As one authority explained, "[F]orensic [SVP] examiners start with diagnoses with poor validity and poor reliability, and they then decrease the diagnostic validity and reliability even further by using NOS categories and by dispensing with *DSM*-required criteria on the grounds that such criteria are mere

'guidelines.'" Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. Sex. Offender Civ. Commitment 17, 72 (2005).[5]

In its opinion, the court of appeals acknowledged that Mr. McGee's diagnoses were the subject of "conflicting professional views," and that those diagnoses were at "variance" with established diagnostic criteria and faced "persuasive" objections from the psychiatric profession. Pet. App. 51a, 55a, 57a. Accordingly, the court of appeals was unable to ascertain whether the diagnoses relied upon in Mr. McGee's SVP trial would be recognized by the psychiatric profession as empirically reliable evidence of serious mental impairment, as were the diagnoses in *Hendricks* and *Crane*. Pet. App. 46a (noting merely that state's diagnosis need not be found "within the four corners of the DSM"). Nor did the court of appeals meaningfully determine whether that lack of reliability violated due process. *See* Pet.

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[5] *See also* Robert A. Prentky *et al.*, *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 Psychol. Pub. Pol'y & L. 357, 369 (2006) (nonstandard NOS diagnoses used in forensic examinations "have no known empirical support"); Holly A. Miller *et al.*, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 Law & Hum. Behav. 29, 32 (2005) (NOS category frequently used by forensic examiners is "so amorphous that no research has ever established its validity"); Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 Law & Hum. Behav. 357, 364 (2004) (empirical study showing "poor" reliability ratings for NOS diagnoses in forensic examinations); Richard Wollert *Poor Diagnostic Reliability, the Null-Bayes Logic Model, and their Implications for Sexually Violent Predator Evaluations*, 13 Psychol. Pub. Pol'y & L. 167, 185 (2007) (confirming Levenson study results).

App. 52a (stating generally that fact finder should exercise "prudence and caution" when making legal determination based on NOS diagnoses). Instead, the court of appeals accommodated that lack of reliability by concluding that due process is satisfied as long as those purported diagnoses are not demonstrably "empty," "patently lacking" or "near-universal[ly]" rejected. Pet. App. 51a, 57a.

The court of appeals' "standard" effectively shifts the burden of proof in SVP commitment trials. Instead of requiring the State to prove that its diagnoses are legitimate, empirically reliable evidence of the alleged mental impairments, based on the DSM or comparable medical authority, the accused is forced to *disprove* the legitimacy of a purportedly DSM-derived, non-specific or "invented" diagnosis. Worse yet, the accused must do so without even being allowed to invoke the DSM as a binding or bottom-line authority. *See* Pet. App. 45a (respondents cannot use DSM to answer "ultimate legal questions").

3. The due process "standard" applied by the court of appeals in Mr. McGee's case is irreconcilable with the reliability of the diagnoses in *Hendricks* and *Crane*. Both of those precedents involved professionally recognized, medically valid and reliable diagnoses. Under the "standard" applied below, the State may civilly confine convicted criminals indefinitely without having to provide valid or reliable evidence of a serious mental disorder. The absence of a meaningful standard for determining diagnostic reliability effectively imposes no medical standard at all, and thus renders SVP

commitment indistinguishable from mere "confinements for dangerousness." *Foucha*, 504 U.S. at 83.

Therefore, this Court should establish a minimum due process standard for the reliability of the diagnoses upon which courts rely in SVP civil commitments, and remand Mr. McGee's case for a determination whether that due process standard has been satisfied.

B. THE QUESTION PRESENTED IS CENTRAL AND RECURRING IN THE ADJUDICATION OF SEX OFFENDER CIVIL COMMITMENTS, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT.

1. As the court of appeals recognized, resolution of the question presented turns on "the present state of Supreme Court precedent" on the issue of the due process requirements for the evidence of mental disorder in SVP commitment proceedings. Pet. App. 57a. An unintended consequence of the dicta about medical terminology in *Crane* and *Hendricks* has been that courts have reached inconsistent interpretations of the minimum level of psychiatric proof required for SVP commitments. *See* Pet. App. 37a (noting "non-uniform" interpretations of *Crane* standard). Some courts have recognized the need for more stringent proof that purportedly DSM-based diagnoses proffered in support of SVP commitment, in particular the NOS diagnoses, are indeed scientifically legitimate and empirically reliable

causes of "serious" behavioral impairment.[6] However, this case presents the issue underlying those challenges in its most basic form: namely, does due process require proof that a diagnosis meets some level of reliability, or does it permit all but the most patently invalid diagnoses?

2. This case is the ideal vehicle to resolve the issue of the minimum due process standard of reliability for the diagnosis necessary to justify civil commitment because Mr. McGee's SVP commitment was predicated on two controversial "not otherwise specified" diagnoses widely used in SVP trials: "personality disorder NOS" (as a lesser substitute for a diagnosis of antisocial personality disorder) and "paraphilia NOS" (for a purported rape-related disorder). Those diagnoses remain the subject of considerable controversy in the psychiatric

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[6] *See, e.g., Graham*, 2010 WL 457445, at *12-15 (government failed to prove that diagnosis of "paraphilia not otherwise specified" met standard of "serious" disorder for SVP commitment, where criteria were also too general to distinguish purported subgroup of those with the disorder from "every recidivist rapist"); *United States v. Shields*, No. 07-12056-PBS, 2008 WL 544940, at *2 (D.Mass. Feb. 26, 2008) (government failed to prove that non-DSM diagnosis was "generally accepted as a mental disorder by professionals who assess sexually violent offenders" and failed to provide evidence to show "how the psychiatric community determines what may properly be included within the Paraphilia NOS category"); *United States v. Abregana*, 574 F. Supp.2d 1145, 1154 (D.Haw. 2008) (government failed to prove that "paraphilia not otherwise specified" met statutory standard of "serious" mental disorder). *See also Lawrence, supra*, 689 S.E.2d at 753 (reversing SVP commitment predicated on diagnoses of "personality disorder not otherwise specified" and "paraphilia not otherwise specified" that relied on respondent's criminal record and unproved allegations of sexual misconduct).

profession precisely as to their suitability and reliability for forensic use in SVP commitment proceedings, given their lack of empirical verification.[7] Resolution of Mr. McGee's challenge will therefore determine whether, or under what circumstances, those diagnoses meet the level of reliability for the diagnostic proof necessary to sustain a legal finding of "mental disorder" justifying indefinite civil confinement.

3. Furthermore, the facts of Mr. McGee's case underscore the questionable reliability of the psychiatric evidence currently used to support SVP commitment. Mr. McGee was "diagnosed" and indefinitely confined as an SVP on the basis of a single conviction of sexual assault and two accusations the courts have recognized as "problematic." Pet. App. 2a-5a. There is no allegation or suggestion anywhere in Mr. McGee's record of any broader history or pattern of sexual crimes or psychotic behavior. Pet. App. 2a-5a. Quite simply, Mr. McGee's own history shows how little it takes, under the current standard, to justify potentially lifelong loss of liberty on the basis of a purported "mental disorder."

Thus, the Court should grant Mr. McGee's petition because the question whether due process requires a reliable psychiatric diagnosis to support indefinite civil detention, or only excludes from

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[7] *See generally*, Zander, *Inventing Diagnosis*, *supra* note 1; Prentky, *Muddy Diagnostic Waters*, *supra* note 1; Allen Frances *et al.*, *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry & L. 375 (2008).

consideration diagnoses that are "empty," "patently lacking" or "near-universal[ly]" rejected, is an important and recurring one. This case presents an ideal vehicle for resolving that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerold S. Solovy
Counsel of Record
David J. Bradford
Eric J. Schwab
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
jsolovy@jenner.com

Attorneys for Petitioner,
Michael L. McGee